In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-958

McDONOUGH POWER EQUIPMENT, INC.,

Petitioner,

vs.

BILLY G. GREENWOOD, a minor child,
by his parents and natural guardians,
JOHN G. GREENWOOD and FREDA GREENWOOD;
JOHN G. GREENWOOD, individually;
and FREDA GREENWOOD, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that the jury foreman's refusal to answer a question posed on voir dire prejudiced Respondent's right to peremptory challenge?

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OPINIONS BELOW

The opinion of the United States

Court of Appeals for the Tenth Circuit

is reported at 687 F.2d 338 and is set out in the appendix to the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Respondent (Greenwood) is dissatisfied with Petitioner's (McDonough) entire statement of the case. McDonough has not stated the case objectively and in some instances has flatly misstated the facts.

On May 25, 1976, Jeff Morris, thirteen years of age, was mowing the Morris yard on a riding mower manufactured by McDonough, pursuant to his father's instructions. Jeff had previously operated the mower approximately thirty hours over a three to four year period.

On this particular day, Troy Greenwood,

Billy's older brother, was riding on the mower with Jeff. The Morrises and Greenwoods were next-door neighbors. While operating the mower, Jeff watched the left front wheel to make certain that he was getting an even cut. Jeff was aware that Billy, two years of age, and several other children, were playing at and around a swingset in the back yard, approximately 25 feet from the area where he was mowing.

While Jeff was mowing the yard, Billy, undetected by Jeff, approached the mower to pick up a doll in the path of the mower. Immediately prior to the accident, Jeff, upon realizing that Billy was in the path of the mower, shouted "watch out." Fearing that he could not stop in time, Jeff turned the mower to the right to avoid hitting Billy. During the course of the turn, the left front tire of the mower went over Billy's left foot. Billy subsequently kicked at the mower with his right foot but both feet went under the mower where they

contacted the mower blade, resulting in the loss of both feet.

At the time of the accident, Freda Greenwood was in her home doing housework. Although she was aware that Troy and Billy were playing in the Morris yard, she was unaware that Jeff was mowing the yard until Troy notified her of the accident.

Following extensive discovery and pretrial, the case proceeded to trial on the basis of strict liability. The Greenwoods alleged that the mower was defective in that: the blade was below the deck of the mower; the blade bar, as manufactured, was not within McDonough's manufacturing tolerances thus causing the blade level to be below the deck, aggravating the injury to the left foot; the blade was improperly designed; the blade brake-clutch was defectively designed because it did not provide a deadman control for stopping, and because of its lack of durability.

The jury, in accordance with Kansas law, was allowed to compare the fault of McDonough, Jeff Morris, Ira Morris, and Freda Greenwood. See Kan.Stat.Ann. §60-258a (1976). The jury returned a verdict finding McDonough 0% at fault, Jeff Morris 20% at fault, Ira Morris 45% at fault, and Freda Greenwood 35% at fault. The jury assessed the damages at $0.00. Upon being instructed by the trial court that, inasmuch as Billy had lost both feet he had definately suffered some damages, the jury reconvened for further deliberations and found that Billy had been damaged in the amount of $375,000.00. The district court thereafter entered judgment that Billy take nothing, that the action be dismissed on the merits, and that McDonough recover its costs.

Appeal was duly taken raising eight issues for review. In the Court of Appeals for the Tenth Circuit, the Greenwoods

contended inter alia the district court erred in denying their motion to approach the jurors and in denying leave to subpoena the jurors to give testimony at the hearing on their motion for a new trial. They also contended they were entitled to a new trial because their right to peremptory challenge was impaired.

The judgment in favor of McDonough was entered on April 25, 1980. On April 29, 1980, the Greenwoods filed a motion to approach the jurors contending that "plaintiffs are of recent information and belief that the jury foreman's, Mr. Payton, son may have been injured at one time, which fact Mr. Payton did not state in response to juror voir dire questions." Record, Vol. 2, at 325.

The Greenwoods' attorney, in his voir dire, had asked the prospective jurors:

> Now, how many of you have yourself or any members of your immediate family, sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted

> in any disability or prolonged pain or suffering, that is you or any members of your immediately family?

Record, Vol. 21, at 39. One juror answered affirmatively, and after additional questioning by Greenwoods' attorney as to his impartiality, was allowed to remain on the jury. Mr. Payton did not respond.

On April 30, 1980, the district court entered a memorandum and order denying the Greenwoods' motion to approach the jurors.

On May 1, 1980, the Greenwoods filed a second motion to approach the jurors which states:

> Counsel for plaintiff shows to the court that to our best recollection and belief, Juror Payton did not answer counsel's question in the affirmative as to whether he or any member of his immediate family had even been seriously injured. The Affidavit of John G. Greenwood attached affirms that Juror Payton's son was seriously injured in a truck tire explosion. Had voir dire questions been answered truthfully, further examination may have revealed grounds to challenge Juror Payton for cause, or affected counsel's decisions with respect to peremptory challenges.

Record, Vol. 2, at 345. On May 5, 1980, the district court entered an order granting, in part, the Greenwoods' second motion:

> Upon due consideration, but cognizant of the parties' need for a speedy ruling, the Court, in an abundance of caution, has determined to grant the motion in a limited degree. The motion will be generally overruled with the exception that counsel for plaintiff will be allowed to inquire of juror Ronald Payton regarding alleged injuries sustained by his son from the explosion of a truck tire.
>
> The inquiry should, of course, be brief and polite. Defense counsel must be present. The witness should not be unnecessarily inconvenienced. The inquiry should be undertaken telephonically or at a place convenient to the juror. The juror should not be summoned to Topeka solely for this purpose.
>
> Counsel should be informed that the Court's review of the court reporter's notes of voir dire indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged and (2) the son sustained a disability or suffered prolonged pain.

Record, vol. 2, at 348.

Counsel for both parties subsequently arranged for a conference call interview with juror Payton. During the course of the interview, which was not preserved as part of the record herein, juror Payton related that his son had received a broken leg as the result of an exploding tire. According to counsel for the Greenwoods, Payton related that "it did not make any difference whether his son had been in an accident and was seriously injured," "that having accidents are a part of life," and that "all his children have been involved in accidents." Appellants' Brief at 7. Counsel for McDonough expressly adopted these facts (Appellee's Brief at 18) except as corrected by adding that Payton "did not regard [his son's broken leg] as a 'severe' injury and as he understood the question [the injury] did not result in any 'disability or prolonged pain and suffering.' As far as Mr. Payton is concerned he answered

counsel's question honestly, and correctly, by remaining silent." Appellee's Brief at 18.

Also on May 5, 1980, Greenwoods filed a Motion for New Trial on the grounds, inter alia, that the district court had erred in denying plaintiff's motions to approach the jurors, thus depriving plantiff of the opportunity to present evidence of juror misconduct in support of the motion; Greenwoods requested oral argument and further requested leave of Court to subpoena jurors to give testimony at the hearing on the motion. On June 2, 1980, the district court denied the motion.

At oral argument in the Court of Appeals, counsel for the Greenwoods pointed out it would now serve no useful purpose to remand for an evidentiary hearing where juror Payton could be questioned inasmuch as the material facts revealing Payton's cavalier attitude toward injuries were not in dispute. But, the decision of the Court of Appeals

does not rest upon facts disputed or undisputed, developed subsequent to trial. The Tenth Circuit held Payton's refusal to answer the question posed on voir dire prejudiced the Greenwoods' right to peremptorily challenge as a matter of law because the information concealed was of sufficient cogency and significance to cause the Court to believe counsel was entitled to know of it. Further, the Court of Appeals held that the suppressed information indicated probable bias of juror Payton because it revealed a particularly narrow concept of what constitutes a serious injury.

SUMMARY OF ARGUMENT

1. The Petition contains misstatements of fact and law. McDonough misstates the holding and import of the decision below.

2. There has not been a departure from the accepted and usual course of judicial proceedings. The decision below

expressly found probable bias of a juror resulting in prejudicial impairment of the right to peremptory challenge. Determination of probable bias by a juror as a matter of law proceeds on a case-by-case basis on the particular facts presented and necessarily calls for the exercise of good judgment by Courts of Appeal. The only real question posed by McDonough turns on the particular facts of this case and is of interest solely to the parties involved.

3. There is no conflict among the circuits concerning the legal principles to apply in determining probable bias of a juror with resulting prejudicial impairment of the right of peremptory challenge. The circuits apply the same legal principles to the particular facts of each case and decide each case on an ad hoc basis. The very nature of the problem precludes assertion of any hard and fast rule; absolute uniformity of result is neither achievable nor desirable because the result varies with the facts.

REASONS FOR DENYING THE WRIT - ARGUMENT AND AUTHORITIES

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE JURY FOREMAN'S FAILURE TO ANSWER A QUESTION POSED ON VOIR DIRE PREJUDICED RESPONDENT'S RIGHT TO PEREMPTORY CHALLENGE.

1. Observations on misstatements in the Petition.

Knowing counsel for McDonough to be able lawyers, we can only assume that misstatements of fact and law contained in the Petition are not made with intent to mislead this Honorable Court, but rather are due to inadvertance and oversight. We feel constrained to point out examples of such inaccuracies before proceeding with argument on the issue.

McDonough states at page 4:

> The trial judge granted leave to contact Mr. Payton and questioned him concerning the allegations.

The trial judge granted leave to contact

Mr. Payton but never questioned him concerning the verified statements of Mr. Greenwood, despite Greenwood's request for leave to subpoena the jurors to give testimony at the hearing on Greenwood's motion for new trial.

McDonough states at page 5:

> Needless to say, counsel's versions of the information imparted by Mr. Payton differed significantly.

Only in this Court has the content of this conversation become such an issue. Greenwoods' quotation of the statements by Mr. Payton (Appellant's Brief at 6-7) were expressly adopted by McDonough in its brief in the Court of Appeals (Appellee's Brief at 18). More important, this is completely immaterial to the decision of the Court of Appeals, as anyone can see by reading it. Thus, McDonough's countless statements throughout the Petition to the effect that the Court of Appeals held that Payton's comments during the post-trial telephone conversation presented evidence of partiality, that the Court of Appeals granted

a new trial based on "plaintiff's counsel's report" of the interview or "unsupported allegations" or relied upon facts which "nowhere appear in the trial record" are simply erroneous.

Along this same tack, McDonough continually infers and implies that Greenwoods purposely failed to make a record and present the facts to the trial court. This is not true. Greenwoods were at first entirely precluded from interviewing jurors, then limited to a phone call with jury foreman Payton and limited to a very narrow area of inquiry, and then denied leave to subpoena jurors to a post-trial hearing. Greenwoods were thwarted in their attempts to make a post-trial record more extensive than that made. This was specifically pointed out to counsel for McDonough by one of the circuit judges at oral argument.

Greenwoods further abhor the implication advanced by McDonough that the decision of the Court of Appeals was influenced by

sympathy, or for that matter, anything other than the quest for justice.

Finally, a complete misstatement of facts appears in the first full paragraph beginning on page 13 and continuing on page 14 of the Petition. Greenwoods' attorney, Gene E. Schroer has demanded a retraction. The only true statement in the entire paragraph is that trial counsel for the Greenwoods, Mr. Schroer, had anticipated that Payton would be a good juror for the plaintiff since he was a meatcutter from Emporia, Kansas, and perhaps might be aware counsel for plaintiff had represented a meatcutter from St. Joseph, Missouri. The statements contained in the balance of McDonough's paragraph are categorically and emphatically denied. Greenwoods request the paragraph be stricken as irrelevant, immaterial, and scandalous, pursuant to Supreme Court Rule 34.6.

2. The Court of Appeals has not so far departed from the accepted and usual

course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This point can be disposed of rather summarily. McDonough complains about the result based, in part, upon a misconstruing of the record and a misreading of the opinion of the Court of Appeals.

When the motion for new trial was overruled by the trial court, it had before it evidence by way of affidavit that juror Payton had failed to respond truthfully and accurately to voir dire questioning (R. Vol. II, at 325 and 345). When the Court of Appeals decided this case, it had before it the entire record which included these same affidavits, a transcript of the voir dire and it was admitted that Payton's son had indeed received a broken leg as the result of an exploding tire rim, and had related that "it did not make any difference whether his son had been in an accident," "that

"having accidents are a part of life," and "all his children had been involved in accidents."

Irrespective of and without relying on these statements, the Court of Appeals held juror Payton's failure to answer the question posed on voir dire prejudiced the Greenwoods' right to peremptory challenge necessitating a new trial where, following established precedent, the unrevealed information was of sufficient cogency and significance that Greenwoods' counsel was entitled to know of it in deciding how to use his peremptory challenges. (Appendix to Petition at A-9). The Court of Appeals further held the unrevealed information indicated probable bias of juror Payton because it revealed a particularly narrow concept of what constitutes serious injury. (Appendix to Petition at A-10). McDonough's assertions to the contrary fly in the face of the Court's opinion.

McDonough cites in the opening of the Petition, Michelin Tire Corp. v. Fallaw, 679 F.2d 880 (4th Cir. 1981, unpublished), cert. denied, 103 S.Ct. 215 (Oct. 12, 1982), stated to be the "mirror image" of this case. Fallaw is said to be cited "to illustrate the potential for abuse" (Petition at 9). McDonough was kind enough to provide us copies of everything McDonough had regarding Fallaw but did not have and could not provide a copy of the unpublished decision. Thus, we are unsure of the legal basis for the decision of the Fourth Circuit and are advised of the facts only as disclosed by the Petition and Brief of Respondent in Fallaw. It would serve no useful purpose to contrast the facts in Fallaw with those in the present case - suffice to say they are different. Apparently both the trial court and the Fourth Circuit in Fallaw found the nondisclosure was not deliberate, and could not find probable bias or prejudice as a matter of law.

Apparently McDonough is upset with the flexible standard applied by the circuits when it becomes necessary to determine the actual or probable bias of a juror who has concealed information on voir dire. McDonough evidently believes this Court must lay down a hard and fast rule to curb the perceived abuse of discretion by circuit judges. The problem of juror bias itself precludes neat circumscription. As Chief Justice Hughes observed in United States v. Wood, 299 U.S. 123, 145-46, 81 L.Ed. 78, 57 S.Ct. 177 (1936), rehearing denied, 299 U.S. 624 (1937):

> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.

Similarly, in Crawford v. United States, 212 U.S. 183, 196, 53 L.Ed. 465, 29 S.Ct. 260 (1909), this Court stated:

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.

And in Peters v. Kiff, 407 U.S. 493, 504, 33 L.Ed.2d 83, 92 S.Ct. 2163 (1972), the joint opinion of Justice Marshall, joined by Justice Douglas and Justice Stewart, stated: "It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce."

There has been no departure from the accepted and usual course of judicial proceedings. There has been no arbitrary indulgence outside the boundaries of accepted principles of appellate review. Dozens of cases handed down every day inescapably rest on matters involving judicial judgment, e.g. when a verdict is reversed as excessive

or inadequate because it "shocks the conscience" of the court, when a verdict is found to be against the weight of the evidence, etc. In such cases involving matters of judgment and in this case involving juror misconduct, this Court cannot proceed on a case-by-case basis to determine whether each particular final judicial pronouncement correctly or incorrectly finds probable bias of a juror. This Court has long admonished the Bar that it is ill-equipped to play such a role: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227, 69 L.Ed. 925, 45 S.Ct. 496 (1925).

3. There is no conflict among the circuits.

A canvassing of cases among the circuits reveals absolutely no conflict. Rather, each case turns on the particular facts presented and is decided on the same standard and legal principles. Only the verbal formu-

lation of the standard varies in determining the probable bias of a juror.

Thus, all circuits appear in agreement that a showing of juror bias is the touchstone to determine whether to grant a new trial. [Appendix to Petition at A-8 and A-9; Photostat Corp. v. Ball, 338 F.2d 783 (10th Cir. 1964); McCoy v. Goldston, 652 F.2d 654, (6th Cir. 1981); Vezina v. Theriot Marine Service, 610 F.2d 251 (5th Cir. 1980)]. All circuits appear to follow this Court's pronouncement that "the bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as a matter of law." United States v. Wood, 299 U.S. 123, 133, 57 S.Ct. 177, 81 L.Ed.78 (1936).

The circuits then apply the above principles to the particular facts of each case, and in so doing arrive at various verbal formulas, all with essentially the same meaning, to guide district courts. For example, the Tenth Circuit states it is

enough to show probable bias and prejudice if the suppressed information was of "sufficient cogency and significance" that counsel was entitled to know of it (Appendix to Petition at A-8 and A-9; Photostat, supra, 338 F.2d at 787). The Sixth Circuit states it is enough ". . . if the undisclosed information is indicative of probable bias concerning either a material aspect of the litigation or its outcome." McCoy, supra, 652 F.2d at 659 (citing, inter alia, Photostat, supra). The First Circuit states there must be ". . . a showing of significant facts from which prejudice can be inferred . . .." Kissell v. Westinghouse Elec. Corp., Elev. Div., 367 F.2d 375, 376, (1st Cir. 1976). Also see United States v. Bynum, 634 F.2d 768 (4th Cir. 1980); Government of Virgin Islands v. Bodle, 427 F.2d 532 (3rd Cir., 1970); Jackson v. United States, 395 F.2d 615 (D.C. Cir. 1968); United States v. Allsup, 566 F.2d 68 (9th Cir. 1977).

Petitioner cites Vezina v. Theriot Marine Service, Inc., 554 F.2d 654, after remand,

610 F.2d 251 (5th Cir. 1980); Martinez v. Food City, Inc., 658 F.2d 369 (5th Cir. 1981); McCoy v. Goldstein (sic), 652 F.2d 654 (6th Cir. 1981); Christian v. Hertz Corp., 313 F.2d 174 (7th Cir. 1963); Hathorn v. Trine, 592 F.2d 463 (8th Cir. 1979); and Johnson v. Hill, 274 F.2d 110 (8th Cir. 1960) to support its claim that there is a conflict among the circuits concerning the standard for granting a new trial based on juror misconduct during voir dire.

A reading of the cases cited reveals no conflict. Vezina, supra, 554 F.2d at 656 simply states there is no "hard and fast rule" and each case "must be decided on an ad hoc basis." Martinez, supra, 658 F.2d at 375 turns on a finding of no concealment of information during voir dire. McCoy supra, quoted above, supports Greenwood's position herein. Christian, supra, without discussion found no abuse of discretion in the trial court's denial of defendant's motion for new trial on ground that one juror failed to reveal on voir dire an earlier

accident she had settled for $100.00. Hathorn, supra, has nothing to do with failure to answer a question posed on voir dire but did reverse for a new trial after a juror during trial volunteered to the court that he had built up a prejudice against an attorney. Johnson, supra, involved waiver of the right to challenge a juror who gave an incorrect response on voir dire since the complaining party knew the response was incorrect when given and failed to object.

McDonough's claim of disagreement among the circuits is thus unsound.

Greenwoods would finally point out that the result reached here is consistent with the rule prevailing in the state where the trial court sat; the Kansas Supreme Court has held in Kaminsky v. Kansas City Public Service Co., 175 Kan. 137, 140, 259 P.2d 207, 209 (1953):

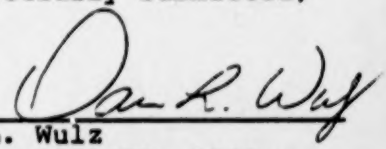
> When a prospective juror, on voir dire examination gives a false or deceptive answer to a question pertaining to his qualifications with the result that counsel is deprived of further opportunity to determine

whether the juror is impartial, and the juror is accepted, a party deceived thereby is entitled to a new trial even if the juror's possible prejudice is not shown to have caused an unjust verdict.

CONCLUSION

For the above-stated reasons, Respondent respectfully requests that the Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,



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Date:
DECEMBER 31, 1982

CERTIFICATE OF SERVICE

I, Dan L. Wulz, in compliance with Rule

28.3 and 28.5 of this Court, hereby certify that all parties required to be served have been served by my causing hand delivery of three copies of the above and foregoing Brief of Respondents in Opposition at the office of counsel for petitioner: Donald Patterson, 520 First National Bank Building, Topeka, Kansas 66603, on the 31 day of December, 1982.

Dan L. Wulz